Supreme Court, U.S.
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No. 91-1322

In The

Supreme Court Of The United States

October Term, 1991

RICHARD J. BRIGNOLI

Petitioner,

v.

BATTLE FOWLER, as Receiver and Liquidating Trustee of Brignoli, Curley & Roberts Associates, et. al.

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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This Reply briefly addresses four issues first raised by respondent in its Brief in Opposition to this Petition, dated March 13, 1992.

PRELIMINARY STATEMENT

Respondent has failed to address the conflict among the circuits relating to the basic issue of federal subject matter jurisdiction in this case, consigning the conflicting decision of the Eighth Circuit in *Buckley v. Control Data Corporation* to a single footnote. Since the filing of the Petition in this matter, a district court in the Ninth

Circuit has dismissed an action between general and limited partners, relying on the *Buckley* decision. *Boulder Creek Co. v. Maruko Inc.*, 772 F. Supp. 1150 (C.D. Cal. 1991).

Instead, respondent has reargued the merits of this case before this Court, taking advantage of superfluous broadsides from the district court opinions below. In doing so, respondent presents the Court with the clear choice of whether issues of federal diversity jurisdiction and right to a jury trial are to be decided by the pen of a single federal district court judge or upon broader policy considerations addressed by petitioner. Despite the nagging sense of unfairness in respondent's approach, petitioner declines the invitation to respond to such arguments.

ARGUMENT

1. The Receiver's Lack of Standing. Respondent contends that the Receiver's action against petitioner is a plenary action separate and apart from the main action in which it was appointed. But under federal law, a receiver, being an officer of the court, has no capacity beyond the jurisdiction of the court appointing him. 7 Moore's Federal Practice Sec. 66.07[1] (1991). Under this Court's holding in *Carden v. Arkoma Associates*, 491 U.S. 185 (1990), the court which appointed respondent had no jurisdiction over the action when the receiver was appointed. When the court is without jurisdiction, the receivership necessarily is improper, the appointment is a nullity and the receiver has no authority to act. *Fahey v. Calverley*, 208 F.2d 197 (9th Cir. 1953), *cert. denied*, 347 U.S. 955 (1954); 12 Wright & Miller, Federal Practice &

Procedure §2985 (1973). Further, even if the court now has jurisdiction of this matter as a class action, a concept petitioner does not accept, the receiver's appointment is confined to representing the dismissed partnership (75-78A), and it therefore lacks authority to assert claims on behalf of the class representatives. *See, Glusband v. Fittin Cunningham Lauzon, Inc.*, 582 F. Supp. 145, 149 (S.D.N.Y. 1984). The summary judgment against petitioner below (2-9A) was entered *after* the partnership had been dismissed from the action.

2. **Plaintiffs Curley and Karanfilian are Unqualified to Serve as Class Representatives.** The Court of Appeals appointed two limited partners, owning less than 32 percent of the partnership, to represent the purported class, even though the district court acknowledged that they do not represent the largest limited partner, BMI (82A), which owns 54% of the partnership. While petitioner is the largest owner of BMI, there are 12 other individual owners. BMI was not a defendant in the primary action, and the district court specifically held that it had not adjudged BMI to be petitioner's alter ego (9A). The district court denied the Receiver's motion for summary judgment against BMI in the ancillary receiver's action, and on January 27, 1992 Receiver moved to dismiss its claim against BMI, and the motion has been granted. As noted in the Petition, the class action is only a fiction, and the class representatives have taken no action on behalf of the class since their appointment. Indeed, the actions of the Receiver since the appointment of the class representatives have been potentially harmful to BMI's interests. Petition at 16, footnote 5.

3. It Is Improper for a Lower Court to Apply a Supreme Court Decision Only Prospectively. Respondent suggests that the Court of Appeals' motive in dismissing the partnership was to spare plaintiffs the prejudice otherwise occasioned by an unforseeable change in the law invalidating a long standing jurisdictional precedent. Respondent's Brief, at 14. Respondent has failed to cite a single instance where, without express direction of this Court, a lower court refused to retroactively apply *Carden* or any other decision of the Supreme Court. Indeed, the *Carden* majority applied its decision retroactively to the very case before it.

4. This Court's decision in Parklane Does Not Apply Here. Respondent has tried to separate the primary action from the ancillary receiver's action below not only to avoid troublesome questions of the Receiver's standing in this action, as discussed above, but also to structure a situation where the action for damages against petitioner, which is the subject of this petition, can be superficially severed from the primary action. Having designated two actions, the so-called Curley Action and the Receiver's Action, respondent now claims that this Court's decision in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), controls petitioner's right to a jury trial in this proceeding. Under this theory, even though petitioner's legal liability was determined in a bench trial in the so-called Curley Action, it is lawful to deny petitioner a jury trial on the issue of damages in the so-called Receiver's Action.

This Court, in *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545 (1990), in a unanimous decision, summarily rejected the argument that *Parklane* applies where,

as here, the parties have been the same throughout and where common legal and equitable issues were first raised in the main suit. In *Lytle*, the Court reaffirmed its long standing policy that a district court may not deprive a litigant of his right to a jury trial by resolving an equitable claim before a jury hears a legal claim raising common issues. 494 U.S., at 552. Respondent does not deny that petitioner's liability determined in the bench trial in the main action was based on common law claims of breach of contract and negligence.

There is no merit, therefore, in respondent's position that the district court, in granting summary judgment for money damages in the ancillary receiver's action, based on findings from the bench trial in the primary action, acted properly to conserve judicial resources. As this Court pointed out in *Lytle:*

> Application of collateral estoppel is unnecessary here to prevent multiple lawsuits because this case involves one suit in which the plaintiff properly joined his legal and equitable claims. Moreover, our refusal to apply collateral estoppel does not dissipate judicial resources in 'needless litigation' over previously resolved issues. *Parklane Hosiery Co.*, 439 U.S., at 326. Although our holding requires a new trial in this case, we view such litigation as essential to vindicating Lytle's Seventh Amendment rights. The relitigation of factual issues before a jury is no more 'needless' in this context than in cases in which a trial court erroneously concludes that a claim is equitable rather than legal, see, *e.g. Dairy Queen, Inc., v. Wood*, 369 U.S. 469 (1962), or that resolution of

> an equitable claim can precede resolution of a legal claim, see, *e.g., Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959). In all of these circumstances, relitigation is the only mechanism that can completely correct the error of the court below. Thus, concern about judicial economy, to the extent that it supports respondent's position, remains an insufficient basis for departing from our longstanding commitment to preserving a litigant's right to a jury trial. 494 U.S., at 553-54.

Respondent would try to convince this Court that petitioner is a bad person undeserving of a jury trial. In *Parklane,* where a similar question arose, Chief Justice Rehnquist stated that:

> It is precisely because the Framers believed that they might receive a different result at the hands of a jury of their peers than at the mercy of the sovereign's judges, that the Seventh Amendment was adopted. And I suspect that anyone who litigates cases before juries . . . would be equally amazed to hear of the supposed lack of distinction between trial by court and trial by jury. 439 U.S., at 354 (dissent).

CONCLUSION

Petitioner respectfully prays that, for the additional reasons stated above, the Court issue writ of certiorari to review the judgments of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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